



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hunter Environmental Services, Inc.
File: B-232359
Date: September 15, 1988

DIGEST

1. Protest based on information provided to protester at debriefing which is filed at General Accounting Office more than 10 working days after debriefing is untimely.
2. Protest contentions that evaluation criteria should be revised and that procurement should have been managed by agency regional office are untimely since the allegations involve solicitation defects which were apparent prior to the closing date for receipt of initial proposals and under Bid Protest Regulations were required to be protested prior to the closing date.
3. General Accounting Office (GAO) will consider an untimely protest under the significant issue exception to GAO's timeliness rules only where the protest involves a matter that has not been considered on the merits in previous decisions and which is of widespread interest to the procurement community.

DECISION

Hunter Environmental Services, Inc. protests the Environmental Protection Agency's (EPA) exclusion of Hunter from the competition under request for proposals (RFP) No. W8-01-321-D1, to perform architect-engineering (A-E) services in connection with hazardous substance disposal sites in EPA's Region IV under EPA's Alternative Remedial Contracting Strategy (ARCS). We dismiss the protest as untimely prior to the submission of an agency report pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1988).

The procurement was conducted under the procedures set out in the Brooks Act, 40 U.S.C. §§ 541-544 (1982), applicable to procurements of A-E services. Under those procedures, requirements and evaluation criteria are publicly

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announced, the qualifications of interested firms are evaluated, discussions are held, and the three most qualified firms are ranked in order of preference. Negotiations then are conducted with the highest ranked firm and, if an agreement cannot be reached on a fair price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee. See Charles A. Martin & Associates, 65 Comp. Gen. 828 (1986), 86-2 CPD ¶ 268.

Hunter submitted a proposal under the RFP and was asked for and submitted standard forms (SF) 254 and 255 which provide information on the firm's qualifications. Hunter then was included in the second phase of the procurement and submitted a management plan. On July 22, 1988, however, EPA informed Hunter that the firm had not been selected for the final phase of the evaluation and its proposal would not be considered further. Hunter requested a debriefing which was held on August 4.

In its protest filed on August 19, Hunter states that, at the August 4 debriefing, EPA officials indicated that agency evaluators did not consider each offeror's receipt of other contract awards, did not check proposal references and did not verify the offerors' assertions of capacity for the Region IV procurement. Based on that information, Hunter asserts that no effort was made to consider whether competition was being maximized nationwide or whether firms which already had contracts in other regions were proposing the same individuals to demonstrate available capacity for the Region IV procurement. Hunter notes that the RFP states that EPA's objective is "to increase competition for contract awards and involve more firms in the program," and argues that the agency's failure to take into account awards in other regions was unreasonable in light of that objective. Hunter also argues that it is unreasonable that the procurement was handled by EPA's headquarters office rather than in Region IV. Hunter requests that this Office direct EPA to cancel the solicitation and resolicit using revised criteria which take into account the impact of awards in other regions on available capacity for Region IV. Alternatively, Hunter requests that its proposal receive further consideration under the current solicitation.

On August 24, EPA filed with our Office a request that Hunter's protest be dismissed as untimely prior to the submission of an agency report. According to EPA, at the August 4 debriefing, Hunter knew or should have known its stated basis for protest--that EPA had not evaluated proposals in accordance with the RFP's evaluation criteria. Since the protest was not filed until August 19, more than

10 working days after the debriefing, EPA argues that the protest was untimely and should be dismissed.

In response, Hunter maintains that its protest was not based on information revealed during the August 4 debriefing. Rather, according to Hunter, it did not have a basis for protest until August 9 when it received a copy of the August 3 issue of the "Superfund Report," a trade journal. Hunter argues that that publication revealed that EPA nationally has been awarding multiple ARCS contracts to a few firms either as prime contractors or subcontractors which can be expected to drive other firms permanently out of ARCS work. Hunter argues that since it did not receive the "Superfund Report" until August 9, its protest filed on August 19, within 10 working days of that date, was timely. Finally, Hunter argues that if its protest is considered untimely, it should be considered on the merits as raising a "significant issue" pursuant to 4 C.F.R. § 21.2(b).

Under our regulations, protests not based on alleged solicitation defects are required to be filed within 10 working days after the basis of protest is or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, Hunter's principal contention, as set out in its initial protest letter, is that, contrary to the RFP evaluation criteria, EPA did not evaluate the offerors' references, receipt of prior contract awards or assertions of available capacity. According to the protest, Hunter became aware at the August 4 debriefing of these alleged improprieties on the part of EPA contracting officials. Although Hunter maintains that it did not have a basis for protest until August 9 when it received the "Superfund Report," that publication includes no information on EPA's evaluation of proposals for the Region IV procurement at issue here. Rather, the "Superfund Report" submitted by Hunter describes EPA ARCS awards in Regions III and V and indicates that some firms have received multiple awards. There is no indication that, after the August 4 debriefing, Hunter learned anything more about the evaluation of proposals; it appears to us that the information in the "Superfund Report" merely confirmed what the EPA admitted during the debriefing: that the agency did not consider in the evaluation an offeror's other ARCS awards. Thus, in our view, the firm knew or should have known its basis for protest at the time of the debriefing and was required to file its protest relating to the evaluation within 10 working days of that date, by August 18. Automated Sciences Group, Inc., B-228913, Dec. 15, 1987, 87-2 CPD ¶ 597. Accordingly,

Hunter's protest of the proposal evaluation is untimely since it was filed on August 19.^{1/}


Hunter also argues that the solicitation evaluation criteria should be revised to take into account the impact of ARCS awards in other regions on an offeror's available capacity and that the procurement should have been handled by EPA's regional office instead of EPA headquarters. Our regulations, however, require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for the receipt of initial proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1). To the extent that Hunter is protesting the evaluation criteria in the solicitation, the protest is untimely since it was not filed until more than 3 months after the May 2 initial closing date for proposals. Further, since it was apparent prior to the closing date that the procurement was not managed by EPA's regional office, Hunter's complaint is also untimely on this basis.

Finally, Hunter requests consideration of its protest under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(b). Whether a protest presents a significant issue is necessarily determined on a case-by-case basis; we will, in a given case, invoke the exception when our consideration of the protest would be in the interest of the procurement system. See The Department of the Navy et al.--Request for Reconsideration, B-230013.2 et al., July 29, 1988, 88-2 CPD ¶ 100. In the usual case, it has been our practice to review an untimely protest under this exception only when the protest involves a matter that has not been considered on the merits in a previous decision and is of widespread importance or interest to the procurement community. See Emerson Electric Co.--Reconsideration, B-220517.2, Nov. 26, 1985, 85-2 CPD ¶ 607. The exception is strictly construed and used sparingly to prevent our timeliness rules from being rendered meaningless. Id. We have

^{1/} Hunter also contends that its protest relates to EPA's overall administration of the ARCS program and the fact that, under that program, many contracts have been awarded to a few firms. Under our Bid Protest Regulations, however, our Office considers protests involving specific procurement actions only, i.e., whether a contract award or proposed contract award complies with statutory, regulatory or other legal requirements. 4 C.F.R. § 21.1(a); Systems Engineering International, Inc., B-218016, Feb. 7, 1985, 85-1 CPD ¶ 164. Thus, Hunter's concern that many contracts under the ARCS program are going to a few firms is not for consideration under our bid protest function.

previously considered an agency's duty to seek out and consider information beyond that listed in an offeror's SF 254 and 255 qualification statements in a Brooks Act procurement for A-E services. See FACE Associates, Inc., 63 Comp. Gen. 86 (1983), 83-2 CPD ¶ 643. Moreover, we fail to see how the issue raised would be of widespread interest to the procurement community since it relates to how the agency treated the offerors in this particular procurement. Dontas Painting Co., B-226797, May 6, 1987, 87-1 CPD ¶ 484. Therefore, we will not consider the protest under the significant issue exception.

The protest is dismissed.



Ronald Berger
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General Counsel